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JOSEPH P. SPRAWOL, JR.

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CASE NO. 90-639

IN THE

Supreme Court Of The United StatesOctober Term, 1990

John C. Reusch,

Petitioner,

vs.

Seaboard System Railroad Company,

Respondent.

On Petition for a Writ of Certiorari
To the United States Supreme Court
From a Decision of the Supreme Court of Alabama

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

I.

Is a substantial federal question presented by the Alabama Supreme Court's holding that a future lost earnings claim could not be submitted to the jury because the plaintiff failed to introduce evidence that would enable the jury to determine the amount of damages in the manner required by this Court's holdings in *Jones & Laughlin Steel Corp. v. Pfeiffer*, 462 U.S. 523 (1983) and *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980).

II.

Is a substantial federal question presented by the Alabama Supreme Court's refusal to review the propriety of a comment made in closing argument to which there was an objection but no ruling by the trial court which could be reviewed.

III.

Is a substantial federal question presented by the Alabama Supreme Court's refusal to review the trial court's giving of a jury charge because the record before the Alabama Supreme Court was inadequate to permit review of the question presented to it.

CERTIFICATE OF INTERESTED PARTIES

Counsel of record for Respondent, CSX Transportation, Inc. (formerly Seaboard System Railroad Company), in accordance with Rule 29.1 of the Rules of the Supreme Court of the United States, effective January 1, 1990, certifies that the following parties have an interest in the outcome of this case.

1. The Honorable Stuart Leach, Judge, the Circuit Court of Jefferson County, Alabama
2. CSX Transportation, Inc., Respondent
(Successor to Seaboard System Railroad Company)
3. CSX Corporation
4. L. Vastine Stabler, Jr., attorney with the firm of Cabaniss, Johnston, Gardner, Dumas & O'Neal, for Respondent, CSX Transportation, Inc.
5. Michael C. Quillen, attorney with the firm of Cabaniss, Johnston, Gardner, Dumas & O'Neal, for Respondent, CSX Transportation, Inc.
6. Terri A. Dobell, formerly attorney with Cabaniss, Johnston, Gardner, Dumas & O'Neal
7. John C. Reusch, Petitioner
8. William W. Schooley, attorney with the firm of Law Offices of William W. Schooley, for Petitioner
9. Lee Pittman, attorney with Pittman, Hooks, Marsh, Dutton & Hollis, P.C., for Petitioner

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BRIEF OF RESPONDENT

The respondent CSX Transportation, Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Supreme Court of Alabama's opinion in this case. That opinion is reported at 566 So. 2d 489 (Ala. 1990)

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

The Petitioner John C. Reusch ("Reusch") has not raised a substantial federal question for review by this Court. His petition for writ of certiorari makes no effort to establish this Court's jurisdiction to review the decision below of the Alabama Supreme Court pursuant to 28 U.S.C. § 1257. The peti-

tion for writ of certiorari is nothing more than Reusch's brief to the Alabama Supreme Court slightly revised to conform to the style required by this Court for a petition. Reusch is asking this Court to reverse the Alabama Supreme Court simply because he disagrees with its decision. It is not this Court's role to simply review the correctness of a state court's ruling. See *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). The Petitioner was the prevailing party at trial. He is simply dissatisfied with the amount of his award.

II. THE SUFFICIENCY OF EVIDENCE TO SUBMIT THE PLAINTIFF'S FUTURE LOST EARNINGS CLAIM TO THE JURY DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

The trial judge in this case instructed the jury that they could not award damages to the plaintiff for future lost earnings. This instruction was given because the plaintiff had not offered any evidence from which the jury could calculate future lost earnings in accordance with the method which is required for such a calculation as set out in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). A determination by a trial court that no or insufficient evidence has been introduced at trial to enable an element of the plaintiff's damage claim to be submitted to a jury does not raise a substantial federal question. Even if a federal question were presented, the trial court's resolution, as well as the Alabama Supreme Court's affirmation of that resolution, was correct.

General considerations for proving and calculating future lost earnings in cases brought pursuant to federal statutes have been addressed by this Court in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983) and *Norfolk & Western Ry. v. Liepel*, 444 U.S. 490 (1980) and by the Fifth Circuit Court of Appeals in its significant opinion of *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984), and *cert. denied*, 469 U.S. 819 (1984). By virtue of those

opinions, a jury must make certain findings in order to ascertain the amount of damages a plaintiff is entitled to receive as compensation for future lost earnings. Among the findings which a jury must make are:

1. An estimate of a lost stream of earnings.
2. The effect of taxation on that stream of earnings.
3. The work life expectancy of the plaintiff.
4. The interest rate which would be earned on "the best and safest investments."
5. The application of the discount rate to each of the estimated installments to determine the total award.
6. The offsetting effect of inflation.

The Alabama Supreme Court determined that Reusch failed to present any evidence from which the jury could make several of the findings which are necessary to calculate an award of future lost earnings:

He offered no evidence of the economic value of his future employment, so there was no conclusive evidence of any lost stream of earnings. He did not offer any testimony or other evidence of the amount of income tax he was paying or the effect of taxation on any stream of earnings he might have had. Although Reusch did offer mortality tables, he did not offer evidence of his work life expectancy. Furthermore, Reusch did not offer evidence of the interest rate on the best and safest investments as well as an application of a discount rate to his alleged stream of earnings. Finally, Reusch offered no evidence of the effect of inflation on any stream of earnings he may have had. At most, Reusch produced only a portion of the evidence necessary to ascertain his stream of earnings. Under the applicable federal decisions, we must conclude that he did not produce the evidence necessary to sustain his claim for loss of future earnings.

Reusch v. Seaboard Sys. R.R., 566 So. 2d 489, 492 (Ala. 1990). Accordingly, the Alabama Supreme Court concluded that the

trial court did not err by instructing the jury that it could not award Reusch damages for lost future earnings and loss of earning capacity. *Id.*

The Alabama Supreme Court's determination that Reusch failed to offer the evidence necessary to enable his future lost earnings claim to get to the jury was a correct one; it was a decision based on a review of the record for sufficiency of the evidence. The writ of certiorari should not be granted for still another review of this correctly resolved issue.

III. THE PROPRIETY OF A COMMENT MADE IN CLOSING ARGUMENT BY RESPONDENT'S COUNSEL SHOULD NOT BE REVIEWED BY THIS COURT IN THE ABSENCE OF A TRIAL COURT RULING ON AN OBJECTION MADE TO THE COMMENT

Reusch bases one question presented for review on an allegedly improper comment made to the jury in final argument by Respondent's counsel. An objection was made to the comment, but the trial court did not rule on the objection. The Alabama Supreme Court did not consider this ground of appeal because there is no adverse ruling of the trial court presented for review. *Reusch*, 566 So. 2d at 491.

This Court declines to exercise jurisdiction when a reasonable state procedural requirement is not observed and the highest state court expressly refuses to decide the federal question for that procedural issue. *Pennsylvania R.R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 462-63 (1926). Assuming that a federal question were raised by a comment in the closing argument at the trial of this case, that question was not preserved at trial and the Alabama Supreme Court properly refused to address it. A substantial federal question has not been presented to this Court concerning this issue.

IV. THE GIVING OF A JURY INSTRUCTION CANNOT RAISE A SUBSTANTIAL FEDERAL QUESTION WHEN THE RECORD DOES NOT PERMIT A DEFINITIVE REVIEW OF THE TRIAL COURT'S ACTION

The Petitioner claims that the trial court erred by charging the jury that an award for any past lost wages should be reduced by the state or federal taxes which the plaintiff is required to pay. However, the court's charge is a correct reflection of the law. See *Liepelt*, 444 U.S. 490; *Seaboard Coast Line R.R. v. Yow*, 384 So. 2d 13 (Ala. 1980). The Petitioner claims that this jury instruction should not have been given because there was no evidence presented of tax rates applicable to past lost wages.

The Alabama Supreme Court declined to hold that the trial court committed error by the giving of the jury instruction. Reviewing the record, the court was unable to conclude whether the plaintiff's evidence concerning a past wage loss was of before-tax or after-tax income. Said the court:

The record does not indicate whether the figures that Reusch used to support his lost past wages claim are before-tax or after-tax figures. Without that evidence, we will not hold that the trial court erred.

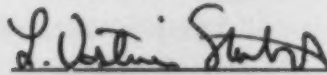
Reusch, 566 So. 2d at 492.

This Court should be presented with a state court holding that directly addresses a federal question and a clear record before it grants a writ of certiorari to review the holding. Neither of those criteria are present here. Therefore, the petition for the writ should be denied.

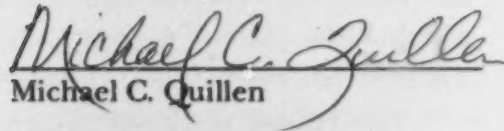
CONCLUSION

The Petitioner in this case simply wants the United States Supreme Court to review the decision of the Alabama Supreme Court with which he is dissatisfied. His petition does not even purport to explain why this case raises substantial federal questions for review. The petition is due to be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief of Respondent has been served upon counsel for petitioner by placing same in the United States mail, properly addressed and postage prepaid, as follows:

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This the 19th day of November, 1990.


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